No. 95-1441

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LINDA J. BLESSING, Director,
Arizona Department of Economic Security,
in her official capacity,
Petitioner,

v.

CATHY FREESTONE, SUSAN HARRINGTON, SONYA MADRID, JUDITH ROGERS and ESPERANZA LAUSTANAU, individually, on behalf of their minor children and on behalf of all persons similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, INDIANA PROSECUTING ATTORNEYS COUNCIL, TENNESSEE DISTRICT ATTORNEY GENERAL CONFERENCE, AND WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS, IN SUPPORT OF THE PETITIONER

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STATEMENT OF THE INTEREST *

The National District Attorneys Association (NDAA) is an organization comprised of District Attorneys and Prosecuting Attorneys from all fifty states, practicing both

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* Counsel for both petitioners and respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

in the criminal and civil fields. The other *amici* are similar state organizations.

Each *amici* contains member attorneys who practice in the area of child support establishment and enforcement under Title IV-D of the Social Security Act. Those attorneys attempt to confer the benefits of paternity on children born out-of wedlock, to locate absent parents who hide from their moral and legal obligation to their children, and to establish and enforce child support orders so that single parent families do not have to rely upon public assistance to survive. The responsibilities of attorneys practicing under Title IV-D continue to grow with the divorce rate and the rate of out-of-wedlock births. *Amici* are also well aware of the numerous and varied obstacles which prevent one hundred percent success in their endeavors.

Amici are practitioners working daily "in the trenches," attempting to attain the goals set by Congress and the Secretary under Title IV-D. The concern they share stems from the their understanding that by upholding the Ninth Circuit, this Court will subject these advocates to unwarranted litigation, diverting their attention from child support enforcement to lengthy and complex court proceedings. *Amici* believe that these lawsuits will undermine their efforts and subvert the purpose of Title IV-D itself.

SUMMARY OF ARGUMENT

This Court, in *Maine v. Thiboutot*, 448 U.S. 1 (1980), granted individuals the right to bring an action under 42 U.S.C. § 1983 (hereinafter § 1983) for a violation of federal law, statutory or constitutional. Almost immediately, however, this Court, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), limited the broad scope of *Thiboutot*, carving out two exceptions to that rule. In order to bring an action under § 1983 after *Pennhurst*, a potential plaintiff must prove that (1) Congress created enforceable rights in the relevant federal

statute, and (2) Congress has not foreclosed private enforcement in the enactment of the statute.

An examination of this Court's jurisprudence on this issue, including the cases decided subsequent to *Pennhurst*, illustrates its hesitation to expand the use of § 1983 outside its traditional arena of civil rights legislation. This Court should restrict the use of § 1983 as a private remedy and hold that Title IV-D does not create enforceable rights in its participants, and that by enacting a comprehensive remedial scheme overseen by the Secretary of Health and Human Services, Congress intended to foreclose private remedies under Title IV-D.

Also at issue are the doctrines of federalism and separation of powers. The Ninth Circuit has created in itself the power to supersede the authority expressly granted to the Secretary of Health and Human Services by Congress, and to interfere in matters traditionally left to the States. This Court should recognize that many states, including these *amici* states, have contracted with an elected County Prosecutor or District Attorney to provide Title IV-D child support services in their county or locality. In doing so, these States have afforded the Title IV-D participants a political remedy as well, a remedy heretofore unmentioned by the lower courts.

Most importantly, by accepting the ruling of the Ninth Circuit Court of Appeals, this Court will place at risk the effectiveness of the entire IV-D program. By failing to address the issues of overall cost effectiveness and allowing time consuming, complex, costly and duplicative litigation, the Ninth Circuit has subverted the goals of the Title IV-D program. The inevitable result of requiring that both money and manpower used for implementing child support services be channeled into legal defense will clearly be seen in the substandard quality of the services and the staff, which can then only lead to more litigation. This Court needs to recognize the tremendous interests at stake in this lawsuit, and act to limit the authority that

the federal judiciary in attempting to usurp, in an apparent effort to micromanage State and local child support programs, which, in fact, will work to the detriment of the programs the federal judiciary is purporting to reform.

ARGUMENT

I. THE NINTH CIRCUIT COURT OF APPEALS FAILED TO PROPERLY CONSIDER THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL AND HOSPITAL v. HALDERMAN*, 451 U.S. 1 (1981), IN HOLDING THAT TITLE IV-D PARTICIPANTS CAN BRING A PRIVATE CAUSE OF ACTION AGAINST THE TITLE IV-D STATE AGENCY.

A. This Court Has Limited the Use of 42 U.S.C. § 1983 as a Private Cause of Action in Areas Outside the Traditional Arena of Civil Rights Violations.

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court expanded the application of 42 U.S.C. § 1983, interpreting the phrase ". . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." to include both federal statutory and constitutional laws. The Court found that the plain language of the statute mandated the inclusion of federal laws outside the traditional realm of civil rights or equal protection claims.

Justice Powell, dissenting in *Thiboutot*, predicted that the "practical effect of the decision" would be the imposition of liability on state and local governments and officials when a person "believes he has been injured by the administration of any federal-state cooperative program, whether or not that program is related to equal or civil rights." 448 U.S. at 22. The dissent enumerated the various entitlements and federal grants that now might create § 1983 plaintiffs, commenting that although it couldn't foresee the "number of new filings in our already overburdened courts . . . no one can doubt that these consequences will be substantial." *Id.*

Since *Thiboutot*, this Court has heeded Justice Powell's warnings and has redefined and limited the situations in which this type of private remedy may be used. Only one term later, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Court created two exceptions to the *Thiboutot* ruling. The Court held that in order to bring a § 1983 action, a court first must determine whether the statute at issue created "enforceable rights" under § 1983, and second, whether Congress had foreclosed a private right of action in the statute itself. *See also Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19 (1981).

The *Pennhurst* majority also discussed federal laws enacted under the authority of Congress' spending power, likening such legislation to a contract between the States and the federal government. In order to receive federal funding, the States agree to comply with the conditions present in the legislation.

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17.

The Court, therefore, looked to whether Congress had enumerated the States' responsibilities under the contract in mandatory or precatory terminology to determine whether the States had agreed in their contracts with the federal government to be subject to the private remedy of 42 U.S.C. § 1983.

More recently, this Court has discussed these two exceptions to the use of 1983 in *Wilder v. Virginia Hospital Associaiton*, 496 U.S. 498 (1990) and *Suter v. Artist M.*, 503 U.S. 347 (1992). In *Wilder*, this Court addressed the use of § 1983 in the context of the Boren Amendment

to the Medicaid Act requiring the States to formulate a medical assistance plan which provided for reimbursement of various medical services through the use of rates which are "reasonable and accurate to meet the costs which must be incurred by efficiently and economically operated facilities." The plan had to be submitted to and approved by the Secretary of Health and Human Services ("Secretary").

The Court, in *Wilder*, formulated a three-part test in determining whether or not a statute creates rights enforceable under § 1983. The inquiry, according to the Court,

> turns on whether 'the provision in question was intend[ed] to benefit the putative plaintiff.' If so, the provision creates an enforceable right unless it reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit, or unless the interest the plaintiff asserts is 'too vague and amorphous' such that it is 'beyond the competence of the judiciary to enforce.'

496 U.S. at 509.

The *Wilder* Court held that the Boren Amendment imposed a "binding obligation" on the States to adopt reasonable and adequate rates of repayment which gave rise to rights enforceable by the health care providers. The Court found the controlling factor to be the "mandatory rather than precatory language" of the Boren Amendment. 496 U.S. at 510. The Court also rejected the Petitioners' argument that Congress had foreclosed enforcement of the Medicaid Act by private remedy, citing this Court's decision in *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987).

In *Wright*, the Court concluded that the "generalized powers" of the Department of Housing and Urban Development (HUD) to audit and cut off federal funds were insufficient to prove Congressional intent to foreclose private remedies under § 1983. The Court noted that HUD chose to exercise its audit power very infrequently, and that no mechanism existed to bring individual problems to HUD's attention. In light of *Wright*, the Court in *Wilder* held that the lack of an appropriate remedial scheme as well as the limited role of the Secretary under the Boren Amendment, demonstrated Congress' intent to allow a private right of action to enforce the statute.

Two years after *Wilder*, the Court addressed the *Thiboutot* ruling in *Suter v. Artist M., supra.* In *Suter*, the Court addressed the Adoption Assistance and Child Welfare Act of 1980 ("Adoption Assistance Act" or "Act") which established a federal reimbursement program for expenses created by the States' administration of foster care placement and adoption services. To qualify for reimbursement, the States had to submit a plan to the Secretary for approval, and under the plan, the States had to make reasonable efforts prior to the placement of the child in foster care to prevent or eliminate the need to remove the child from the home.

The Court focused on the word "reasonable," which was used both in the Boren Amendment and in the Adoption Assistance Act, but differentiated between the usage in both statutes. Under the Boren Amendment, Congress required the States to enact a plan containing reasonable and adequate rates of reimbursement, and the Court found guidance in both the statute and the regulations regarding methods of calculating reasonable rates. The use of the word "reasonable" in the Boren Amendment, therefore, in no way impacted the mandatory duties of the States to formulate the reimbursement plan.

"Reasonable efforts" in the Adoption Assistance Act, however, was not qualified by any further statutory guidance. The only requirement Congress placed on the States was to submit a plan to the Secretary containing sixteen features listed in the statute. The States, therefore, were left with broad discretion to act on a case by case basis.

Because the States were granted these broad limits, the Court held that the language "reasonable efforts" did not confer upon private individuals any enforceable rights. 503 U.S. at 359, 360.

The *Suter* Court also discussed the enforcement mechanisms of the reasonable efforts clause in place in the Adoption Assistance Act, including the authority invested in the Secretary to reduce or terminate payments to a State for failing to properly administer its plan, or upon a finding that the State's plan no longer conformed with the statutory requirements. Because the Court had already held that no enforceable rights existed in the Act, the Court did not rule on whether Congress had foreclosed remedies under § 1983. The Court did determine, however, that "the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter." 503 U.S. at 360, 362.

Subsequently, Congress enacted an amendment in apparent disagreement with *Suter*. In 42 U.S.C. § 1320(a), Congress amended Title XI of the Social Security Act, stating that any action brought to enforce a provision of the Social Security Act:

> is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan. . . . This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability.

Although this amendment seemingly manifests Congress' desire to return to pre-*Suter* principles, the amendment is not intended to expand the availability of private remedies any further than already done by this Court. This amendment, therefore, has little bearing on this Court's refusal to allow a private right of action in the instant case, as *Suter* relied on the preceeding cases to

which Congress desires a return. *Suter* simply utilized the guidelines already established by this Court, applied them to the statute at hand, and concluded that, under those guidelines, no enforceable rights exist.

The Congressional amendment should have no impact on this Court's decision to deny a private right of action to Title IV-D participants. Applying the guidelines and tests formulated by this Court since *Thiboutot* it remains clear that the absence of a private remedy under Title IV-D does not render the statute a "dead letter."

B. The Ninth Circuit Erroneously Held That Title IV-D Creates "Enforceable Rights" in Its Participants.

The Ninth Circuit Court of Appeals, in the decision below, misinterpreted the Social Security Act in determining that it does confer enforceable rights upon Title IV-D participants. Although the court recognized that *Suter* and *Wilder* potentially conflicted, the court concluded that *Suter* represented an "elaboration and amplification of the *Wilder* test rather than an unannounced and unacknowledged departure," and read *Suter* "as the Court's effort to provide additional guidance on what is a 'binding obligation' and when an asserted interest may be judicially enforceable." 63 F.3d at 1148. Because the court relied on *Wilder*, and failed to adequately consider the implications of *Suter* to the instant case, the court mistakenly held that the Social Security Act creates enforceable rights in the Title IV-D participants.

Judge Kleinfeld, dissenting in *Freestone*, accurately and concisely recognized that the instant matter is distinguishable on its facts from Wilder. Judge Kleinfeld noted that *Wilder* involved money paid directly to the private health care providers, not to the state governments. Also, unlike Title IV-D, the Boren Amendment only allowed the Secretary limited oversight, leaving the hospitals with no assurance that the reimbursement rates would be reasonable or adequate. The Boren Amendment

"places the responsibility for the development of reasonable and adequate payment rates with the States." 496 U.S. at 507 (citing 48 Fed. Reg. 56047 (1983)). The Secretary, therefore, merely reviewed the States' assurances that they had formulated reasonable rates, but did not require that the States submit the actual findings or underlying data.

In the case of the Title IV-D program, "substantial compliance" requires the State to meet the standards set forth in the regulations in 75% of the State's cases. As Judge Kleinfeld accurately submits, "even if the State substantially complied, one out of four custodial parents would find herself or himself within the unfortunate 25%." 68 F.3d at 1158. Because of this, there is no way for the Court to determine that the Social Security Act conferred enforceable rights upon all custodial parents receiving Title IV-D services, as Congress recognized that not all Title IV-D participants would receive adequate services.[1]

The majority in *Freestone* skirted the issue of whether substantial compliance would preclude an individual remedy against a IV-D agency. 68 F.3d at 1151. The dissent in *Freestone*, however, expressly recognized that a sub-

[1] This Court's recent discussion of the issue of standing in *Lewis v. Casey*, 517 U.S. —— (1996), also illustrates this point. Writing for the majority, Justice Scalia takes issue with Justice Stevens' dissenting conclusion that the named plaintiff's injuries were sufficient to overcome any constitutional challenges to the standing of the class. Justice Scalia opines, "standing is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is, of course, not the law."

In the instant case, standing was dispensed in gross, and the plainitffs were given the right to complain about all administrative deficiencies in the Title IV-D program, regardless of the individual's particular grievance.

stantial compliance standard allows for less than perfect performance. Indeed, Congress has recognized that success in every case is virtually impossible due to the plethora of variables involved in each individual case.

Congress' intentions are enumerated in the Senate Report accompanying the passage of the amendments to Title IV-D in 1984, which declared:

> In establishing standards of effectiveness, a reasonable degree of flexibility is essential. Based on the experience in the program to date, it should be possible to set standards which represent minimum acceptable levels of success in carrying out the various objectives of the child support program.

S. Rep. No. 98-307 (1984) at p. 32. *Also*, 4, 1984 U.S.C.C.A.N 2397 at 2428

The standards defining substantial compliance have been adopted by the Office of Child Support Enforcement as 90 percent compliance with case opening and closing procedures (45 CF.R. § 305.20(a)(2)) and 75 percent compliance in operations (45 C.F.R. § 305.20(a)(3)).[2] The 75% substantial compliance standard raised criticism from some who felt that the standard resulted in many cases going untouched as the States could circumvent their responsibilities by taking some nonsubstantive action in 75% of their cases. The response stated that the critics held:

> a misunderstanding of Federal Title IV-D requirements which require States to take appropriate action in all cases referred for and applying for program services. Requirements for providing and accepting applications and closing cases are clear-cut, definitive, and follow specific steps. They are in the nature of administrative activities, distinguishable from ac-

[2] *See, Child Support Enforcement Program: Paternity Establishment and Revision of Child Support Enforcement Program and Audit Regulations*, 59 Fed. Reg. 66204 (December 23, 1994).

> tivities connected with providing services which are more complex and which permit greater flexibility and discretion. . . . For over ten years, [the Office of Child Support Enforcement] has used a 75 percent standard to determine States compliance with Federal program requirements. The standard has proven to be a reasonable expectation of the level of State performance in providing program services.

59 Fed. Reg. 66243.

Judge Trott, dissenting in *Withrow v. Concannon*, 942 F.2d 1385, 1390 (9th Cir. 1991), directly confronted the crticisms leveled at the substantial compliance standard, stating that the standard

> is not an invitation to the states to perform their duties in a haphazard fashion or in bad faith. It is a stringent yet understanding standard that requires the best of an agency under the circumstances.

Id.

In *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir. 1989), the Eleventh Circuit Court of Appeals held that Title IV-D does not create enforceable rights in its participants, basing its holding largely on the legislative intent in enacting Title IV-D of the Social Security Act.[3] Citing the applicable Congressional Committee report, the Court determined that the primary concern addressed by the Title IV-D program was "collecting child support

[3] *Wehunt* relied upon the four prong test enumerated by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975) to determine whether a statute created a private right of action within the statute itself. The Court looked at the following factors: 1) is the plaintiff "one of the class for whose especial benefit the statute was enacted"; 2) is there any indication of legislative intent to create or deny a private remedy; 3) is a private remedy consistent with the underlying purposes of the statute; and 4) is the cause of action "traditionally relegated to statute law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." The *Wehunt* Court focused on the second prong.

in order to reduce the welfare rolls." 875 F.2d at 1565. The Court opined that the reading of the report lead to the conclusion the goal of Title IV-D was to immediately lower the cost to the taxpayer as well as to lessen the number of families enrolling in welfare in the future—benefits to society as a whole rather than specific individuals. *Id.*

The Court also looked at the nature of the relationship between the Title IV-D agency and the program's participants. Because custodial parents who receive AFDC are required to participate in the program, and assign their rights to the State, they are giving the States the opportunity to "recoup the financial drain imposed by the welfare system on the state and federal treasuries." In this way, Title IV-D benefits the entire community by "diminishing the welfare outlay," and, therefore, creates no right of private action in the individual Title IV-D participants.

C. Congress Did Not Intend for Title IV-D Participants to Bring Private Remedies Under § 1983, as It Had Foreclosed Such Rights by Enacting a Comprehensive Remedial Scheme in the Statute Itself.

Although *Suter* did not address the second exception to the *Thiboutot* holding enumerated in *Pennhurst*, the *Freestone* majority again mistakenly relied on *Wilder* and *Wright*, *supra* in holding that Congress did not intend to foreclose a private remedy in Title IV-D of the Social Security Act.

In *Wright*, this Court held that the remedial scheme in the Brooke Amendment to the Housing Act was insufficient in itself to prohibit a private cause of action under § 1983.[4] To the contrary, the role of the Secretary under

[4] The remedial scheme set forth in the Brooke Amendment is much weaker than that found in Title IV-D. Congress, in the

Title IV-D is much more expansive than in both the Boren Amendment and the Brooke Amendment. In all three enactments, Congress invested in the Secretary the power to withhold funds from the States for noncompliance.

Title IV-D, however, creates in the Secretary a mandatory, proactive role in overseeing the states' IV-D agencies by requiring an audit every three years, "designed to determine whether State child support enforcement programs operate in conformity with Federal law and regulations." 59 Fed. Reg. 66240. If, after an audit, the Secretary determines that corrective measures are necessary, the Secretary must then perform an annual audit to monitor compliance with the corrective plan. Because the Secretary is mandated to provide such extensive oversight, Congress' exclusion of a private remedy in Title IV-D does not render the "substantial compliance" clause a "dead letter." 503 U.S. at 361.

An alternate remedy also exists aside from those provided by the Secretary, enhancing the remedial plan set forth under Title IV-D itself. In the Federal Register, the Administration for Children and Families provided assurance that its regional offices will monitor compliance with the Title IV-D requirements "through program and financial reviews and the State plan approval process." 59 Fed. Reg. 66212.

The Sixth Circuit reached the same conclusion in *Carelli v. Howser*, 923 F.2d 1208 (1991). There the court held

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Brooke Amendment, granted the Department of Housing and Urban Development (HUD) the authority to audit the States' Public Housing Authorities (PHA) to monitor compliance with the statute. HUD, however, refused to audit frequently, relying on its handbook, which only requires an audit every eight years. No other mechanisms exist to enable HUD to effectively oversee the performance of local PHA's. In one regulatory amendment, HUD was even relieved of its duty to approve the PHA's annual utility allowance schedules before the effective date of those schedules.

that while Title IV-D did create enforceable rights for its participants, Congress had foreclosed a private right of action in the Social Security Act by enacting a thorough remedial scheme in the statute itself. The Sixth Circuit reversed and remanded the District Court's denial of the State of Ohio's motion to dismiss, finding that Congress had enacted within the Social Security Act a remedial enforcement mechanism comprehensive enough to foreclose any private causes of action under § 1983.

After reviewing the regulations governing the Secretary's auditing requirements, the Court determined that Congress did not intend the federal judiciary "to occupy the same ground at the same time and in the same manner as the Secretary." 923 F.2d at 1216. The court also noted that each member of the class involved in the suit had other private legal remedies available for securing child support enforcement or obtaining any of the other services mandated under Title IV-D.

D. Other Lower Court Rulings Granting a Private Remedy to Title IV-D Participants Under § 1983 Can Clearly Be Distinguished on Their Facts.

The Ninth Circuit cited other lower court rulings which have upheld the right of Title IV-D participants to commence a 1983 action against a state's Title IV-D agency. These other cases, however, can be distinguished on their facts.

The Eighth Circuit Court of Appeals, in *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir. 1993), held that a custodial parent may bring a private cause of action under § 1983 for violations of the Title IV-D mandates. In *Howe*, the plaintiffs filed a class-action lawsuit against the State of South Dakota for its refusal to extend Title IV-D services to custodial parents when the absent parent resided on an Indian reservation. The State reasoned that the jurisdictional barriers presented by the Indian tribal courts made paternity establishment and child sup-

port enforcement virtually impossible. The court held, however, that Congress did not intend for an entire class of citizens to be excluded from the Title IV-D program, and therefore, allowed the custodial parents a private right of action.[5]

In *Albiston v. Maine Commissioner of Human Services*, 7 F.3d 258 (1st Cir. 1993), the First Circuit Court of Appeals noted that *Suter* appeared to depart from the § 1983 framework set forth in *Wilder*, but then concluded that *Suter* actually "left the basic *Wilder* framework intact, but added a further threshold inquiry, applicable in cases involving federal-state funding statutes enacted pursuant to the 'Spending Clause.'" 7 F.3d at 263. The argument enumerated by the First Circuit is illogical on its face. As both *Wilder* and *Suter* involved federal-state funding statutes enacted pursuant to the Spending Clause, the court's claim that *Suter* enhanced *Wilder* instead of limiting it, contravened its own recognition that, while the *Suter* Court did not overrule any previous cases, it did weaken earlier § 1983 precedents, including *Wilder*, "in certain important respects."

Although *Albiston* held that a custodial parent could bring a private action under § 1983 for a violation of the Title IV-D mandates, the case revolved around an issue

[5] *Howe* involved a much more limited situation than that confronted by the Ninth Circuit. In South Dakota, if an absent parent resides on an Indian reservation, the Title IV-D agency attempts to procure a stipulation of paternity and an appropriate child support award. The state courts, however, lack jurisdiction over residents of the reservations, making it impossible to pursue the absent parents in the state courts. The State may use the tribal courts to bring the paternity actions, but the federal government does not provide matching funds for actions taken in those courts. By being forced to pursue absent parents in the tribal courts, the state has no control over whether the proceedings are violative of Title IV-D. If they are, the Secretary may then withhold funds from the state even though it is attempting to comply with the order of the Court of Appeals.

distinct from the matter at issue in this litigation. In *Albiston*, the Court was presented with claims by custodial parents that their "gap" and "pass-through" checks were not being disbursed in a timely fashion. The Court, therefore, was not faced with the issue of whether the custodial parents were entitled to bring a private cause of action against the State for failing to meet the Title IV-D enforcement standards. The custodial parents in *Albiston* had already received child support enforcement, and were entitled to the $50.00 per month "pass-through" from the support which had been paid by the absent parent. Every case in which a noncustodial parent paid his or her child support created a custodial parent with a right to collect a "gap" check and a "pass-through" check within a reasonable time frame. There is no regulation in that section of Title IV-D which allows the State to disburse the "gap" and "pass-through" checks in 75% of the cases, and that particular regulatory language is "specific, definite and mandatory." 7 F.3d at 265.

II. PRINCIPLES OF FEDERALISM AND STATE SOVEREIGNTY PRECLUDE A § 1983 ACTION BROUGHT BY PARTICIPANTS IN THE TITLE IV-D PROGRAM.

A. The Area of Family Law Has Traditionally Been Left to the States.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court promulgated a four-part test to aid lower courts in determining whether a statute created a private right of action within the statute itself. *See, supra* note 3. The last factor in the Court's test was whether the cause of action "traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78. Although the second prong of the test has become the primary, dispositive factor, the others are "indicative of its presence or absence." *Thompson v.*

Thompson, 484 U.S. 174, 190 (1988) (Scalia, J. concurring) (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979)). Plaintiffs in the instant matter clearly cannot claim that the last prong of the *Cort* test has been satisfied.

Family law has long been a matter reserved for state courts. In *Thompson v. Thompson, supra*, the Court held that the Parental Kidnapping Prevention Act (PKPA) does not create a private right of action in the federal courts, but instead extended the Full Faith and Credit Clause to child custody orders. The Court, addressing the applicability of the PKPA to individual state court custody orders, stated that "[i]nstructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state law questions that they have little expertise to resolve." 484 U.S. at 186.

In the arena of child support enforcement, similar federal enactments exist through which Congress intended to extend full faith and credit to state child support orders. *See*, 28 U.S.C. § 1738(B) (1994), Full Faith and Credit for Child Support Orders. In passing this law Congress recognized the difficulties inherent in interstate child support enforcement. Like the PKPA, however, Congress did not intend for the federal judiciary to play a role. If Congress had intended to federalize area of family law, it could have done so in statutes like the PKPA or 28 U.S.C. § 1738(B). In passing a law to aid states in the enforcement of their own laws concerning the family, Congress did not include intervention by the federal courts.

Congress also drafted the Uniform Reciprocal Enforcement of Support Act (URESA) and the Uniform Interstate Family Support Act (UIFSA) in order to facilitate interstate child support enforcement by Title IV-D agencies to aid States in complying with 42 U.S.C. § 666 mandating that the States adopt procedures to give full

faith and credit to orders of other States. To accomplish this result, the majority of states have enacted the federal UIFSA model, although some do still perform services under the URESA or RURESA (Revised URESA). The Welfare Reform legislation pending before Congress mandates that the States enact UIFSA.

The States retain remedies within UIFSA. The Act contains the specific duties of the Title IV-D agency. If the Title IV-D agency is neglectful in the administration of its duties or refuses to provide IV-D services, the Attorney General or other agency may direct the agency to perform its statutory duties or perform the services itself directly to the individual.[6] By including this remedial provision in the UIFSA statute and RURESA, Congress affirmed its intentions to keep the federal courts out of the business of child support enforcement.

By including this remedial provision in UIFSA, along with the remedial scheme in Title IV-D itself, the states have affirmed their intentions to retain jurisdiction over the issue of child support enforcement. If Congress adopts the Welfare Reform legislation, it will have taken a position inconsistent with one which would allow federal courts' control over this important area of law.

B. Many States Have Afforded a Political Remedy to Individual Title IV-D Participants Inherent in the Creation of the Title IV-D State Agencies.

States possess a fundamental right to be self-governing. Inherently included in the states' self-determination is a remedy not yet addressed by the courts. Under the Tenth Amendment, States have authority over all functions not expressly prohibited to them or expressly granted to Congress in the Constitution. The States, therefore, create

[6] UIFSA § 308. This section is similar to RURESA § 18(c) which gave the State Attorney General, or other designated agency, oversight responsibility and the power to seek compliance with the Act.

their individaul governments and government agencies, and regulate the manner in which each branch or agency of their governments will function.

Included in the agencies created by the states is each state's Title IV-D agency. The *amicus curiae* state organizations involved in this endeavor have created their Title IV-D agency in consultation with or under their individual offices of the Prosecuting Attorney or District Attorney. The county Prosecuting Attorney or District Attorney in each of these states is an elected official, which, by definition, provides a very obvious remedy. Participants in these, and many other states have an effective political remedy at their disposal each election year. If the participants are dissatisfied with their enforcement or establishment services, they can act on their dissatisfaction and vote the current Prosecuting Attorney or District Attorney out of office.

C. By Allowing a Private Right of Action, the Ninth Circuit Created an Impermissible Infringement on State Sovereignty by the Federal Judiciary.

The Sixth Circuit Court of Appeals, in *Carelli v. Howser, supra,* provided a concise analysis of the conflict between the traditional concepts of federalism and a private right of action under 1983. Citing Justice Powell's dissent in *Maine v. Thiboutot, supra,* the Sixth Circuit concurred with his opinion that the *Thiboutot* majority had created " 'a major new intrusion into State sovereignty under our federal system.' " 923 F.2d at 1213. The *Carelli* court, guided by Justice Powell's warning, undertook a determination of "just how far such an intrusion should be carried." The court concluded that:

> [T]he nature of the relief sought by plaintiffs here would cause a federal court to carry out an oversight function beyond that intended by Congress given the comprehensiveness of the remedial scheme provided in the statute.

Id.

The holding of the Ninth Circuit extends the intrusion into State sovereignty by allowing the federal judiciary to rule on matters intended to be overseen by the Secretary, an agent of the executive branch of government. Although some federal oversight of the "contract" between the States and the federal government created pursuant to Congress' spending power is necessary, that oversight should be limited. Further intrusion involves the federal government dictating the manner in which state prosecutors should be doing their jobs, a function which should be left in the hands of the citizens of the states through the exercise of their right to vote.

This Court recently ruled on the issue of state sovereignty in *Lewis v. Casey*, 517 U.S. —— (1996). *Lewis* involved the constitutional right of access to the courts and the ability of the federal courts to reform state prison systems upon a finding that state prisoners are not afforded that right.

Writing for the majority, Justice Scalia addressed the District Court's appointment of a special master to formulate a plan for reform, and explained that various manners in which the District Court impermissible infringed upon the State's authority. Justice Scalia briefly discussed the injunction issued by the District Court, calling it "inordinately—indeed, wildly—intrusive." Because this was so obviously unacceptable, Justice Scalia chose not to "belabor the point." 517 U.S. at ——.

This Court also noted that the special master "failed to give adequate consideration to the views of the State prison authorities." In doing so it rejected the:

> [S]trong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct errors made in the internal administration of their prison.

Id.

The Court in *Lewis* also recognized the inherent violation of the separation of powers, discussing the blurring of the lines between the judicial and executive branches in lawsuits involving a government agency that has been allegedly mismanaged.

> Of course the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm. But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly.

Id.

This Court, in *Lewis*, strongly expressed its disapproval of the micromanagement of state programs by the federal district courts. By allowing Title IV-D participants to bring a private cause of action under § 1983, this Court will invite the very same micromanagement it repudiated in *Lewis*. The Ninth Circuit, in *Withrow v. Concannon*, 942 F.2d 1385 (9th Cir. 1991), provides an example of the extremes to which federal courts will sanction interference into state programs.

In *Withrow*, the court transformed the 75 percent "substantial compliance" standard into a nullity, defining it as the point at which the federal government withholds funding from the States. The court held that the "regulations require compliance, not 'substantial compliance.'" 942 F.2d at 1388. The only point at which the Court of Appeals felt that the District Court had the equitable discretion to deny injunctive relief was when any failure of total compliance was "truly *de minimus*, where the state has come to comply 'as strictly as is humanly possible.'" The State, therefore, must eliminate all but "the

truly inevitable instances of non-compliance." 942 F.2d at 1389.

If this Court allows a private right of action, and a one hundred percent standard is invoked by the federal courts, the Title IV-D program will be thrust into a hopeless situation. The slippery slope of the Ninth Circuit's ruling leads to a tremendously inefficient Title IV-D agency. A logical requirement of the "everything humanly possible" standard includes forced appeals of every unsatisfactory decision by the trial judges, thereby expanding the responsibilities of the state agency to a truly unmanageable level.

In his dissent, Judge Trott discussed his biggest concern with the majority's "misguided no-harm no foul rationalization," stating that it is

> inappropriate to tie the hands of a district judge called on to exercise discretion in deciding whether the equitable remedy of injunction is called for in these cases. An agency must be virtually perfect regarding the requirements in question, or it becomes subject to an injunction with all its attendant burdens.

942 F.2d at 1390.

According to Judge Trott, the courts instead need to be aware and "thus make some allowance for the difficulties of administering an extensive bureaucracy." *Id.*

III. UPHOLDING *FREESTONE v. COWAN* WILL PRODUCE A CHILLING EFFECT ON THE WORK OF THE TITLE IV-D AGENCIES AND LEAD TO A DRAMATIC DECREASE IN CHILD SUPPORT ENFORCEMENT AND ESTABLISHMENT.

The Sixth Circuit Court of Appeals in *Carelli v. Howser, supra*, discussed the various problems inherent in allowing a § 1983 lawsuit to be brought against a state IV-D agency. The first problem, according to *Carelli*, is that any remedial action taken by the Secretary under

Title IV-D is statewide. In *Carelli*, and in other states where a Prosecutor or other country attorney has contracted with the state to locally administer the child support program, lawsuits have been brought against certain counties [7] and the state agency, but not the Secretary. By entering an order regarding corrective action to be undertaken only by those counties, the potential exists for the court's order to contradict the Secretary's findings, thereby creating an administrative nightmare.

The *Carelli* court also foresaw a major problem stemming from the makeup of the class itself. The class certified by the District Court in *Carelli* consisted of all persons currently eligible and eligible in the future for child support services in the two counties involved in the lawsuit. As the court pointed out, "the majority of the class members so identified are receiving child support services." 923 F.2d at 1216 n.13. The court correctly recognized that many of the custodial parents who do not receive services are those who:

> [C]annot or will not supply any information on the whereabouts of delinquent support obligors or putative fathers. All they can say is that the state should try harder to find them—a very nebulous concept on which to base relief.

923 F.2d at 1216.

Most importantly, *Carelli* illustrated the plaintiffs' lack of deference to cost effectiveness when requesting appropriate remedial action. Although some of the lower courts have allowed plaintiff's request for relief under § 1983, it is the courts who are most ill-equipped to make a determination of cost effectiveness consistent with the normal operations of a state's Title IV-D agency.

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[7] *See, e.g., Linda Young et al. v. Eloise Anderson, Director, California Dept. Of Social Services, in Her Official Capacity, Daniel Lundgren, Attorney General, Michael Ramsey, Butte County District Attorney, in His Official Capacity, and County of Butte,* EDCal No. CIV-S-95-942LKK/JFM.

First, as mentioned above, the courts have dealt with these actions on a county-wide, rather than a state-wide basis, creating a potential conflict with the Secretary's state-wide corrective plan. Pursuant to 42 U.S.C. § 653, the Secretary has created a unit trained to perform various audit functions over Title IV-D operations. The courts, on the other hand, have not obtained any particular training in the area of Title IV-D services administration. As stated in *Carelli*,

> What we envision happening would be an order coming from the court directing the State of Ohio to increase staff size, do a better job of establishing priorities and setting time limits for performing required tasks as well as responding to calls for service. In short, the court's order would address all the shortcomings the Secretary has already ordered corrected.

Id. (citations omitted).

The court, admitting that its illustration was an obvious over simplification, pointed out that even an order as limited as the one above "would require lengthy and complex hearings." 923 F.2d at 1216 n.10.

Second, the states, according to the regulations enacted pursuant to Title IV-D, are allowed to, and must, prioritize their cases. See 42 C.F.R. § 303.10. This prioritization is to be implemented "statewide or in a particular political subdivision of the State" in order to efficiently "manage its caseload." By enacting this section, the Secretary codified its acute awareness of the importance of cost effectiveness when administering Title IV-D services. As the Sixth Circuit noted: "We do not read the [Social Security Act] to require that a State spend $100 to collect $50." 923 F.2d at 1216 n.13.

Economically, it is unwise to allow two different authorities to determine corrective remedies for a State's IV-D agency. Title IV-D was enacted with the stated purposes of preventing families from relying on public assistance, and collecting the public monies expended on

families who could not remain self-sufficient without public assistance. Those goals will be unattainable if the Court upholds the use of § 1983 as a private remedy. A delicate balance of economic prioritization currently exists in the states' IV-D agencies, explicitly sanctioned by the Secretary. Allowing a federal judge to upset that balance will defer limited resources from what is essential, maintaining an effective child support program.

Economic prioritization must also occur among all social services performed by state agencies, a factor the courts will not consider when fashioning equitable relief. By requiring the Title IV-D program to exceed the standard set forth by Congress in the statute, all state programs are placed in jeopardy. Dissenting in *Withrow v. Concannon*, 942 F.2d 1385, 1390 (9th Cir. 1991), Judge Trott recognized the tremendous burden placed on state when the federal court became involved in the management of its social programs.

> It is folly in a time of shrinking revenues at the state level to believe that the expense of bringing these programs into virtually perfect compliance is insignificant. All over our nation, needed public services are being slashed and burned, yet a federal court now effectively eliminates a state's ability to control administrative costs for these programs.

Id.

By allowing lawsuits such as this to proceed, this Court will also be failing to recognize the tremendous effort and commitment put forth every day by those working in the state and local IV-D offices. As attorneys practicing under Title IV-D, *amici* understand the tremendous effort necessary to meet the standards set forth by Congress in the statute and regulations. It is a frequently frustrating and daunting task, in which attorneys and staff confront various obstacles which, among others, include custodial parents who refuse to cooperate in establishing paternity or collecting child support, responding states who relegate interstate enforcement cases to the lowest priority, ex-

tremely discontented IV-D participants who unleash their frustrations on the local staff who is attempting to provide legal services, extremely unmotivated noncustodial parents who refuse to work to support their children. By usurping the authority of Congress and the Secretary, the Ninth Circuit now wishes to add to that list of concerns the possibility of federal judicial oversight and micromanagement.

Attorneys and paraprofessional staff practicing under Title IV-D are committed to serving families, and particularly, children in need. Many of the attorneys and staff have participated in the Title IV-D Program since its inception in 1976. Should this Court uphold the Ninth Circuit, the commitment of these child advocates will be rewarded by subjecting them to unwarranted and cumbersome litigation in federal court, which could result in money judgments, findings of contempt or other negative sanctions. Although committed to child support enforcement, local officials will likely react to this specter of litigation by terminating their contracts with the state Title IV-D agencies. Based on the unrealistic expectations and generalized dissatisfaction of a handfull of custodial parents, the majority of custodial parents and children will lose the experience and commitment of many of the most experienced and knowledgeable attorneys and paraprofessionals in the Title IV-D Program. The affected states or localities will then be required to completely reorganize the local program, and the experienced and knowledgeable attorneys and staff will probably be replaced by new staff that is inexperienced and untrained in child support matters. This reaction will then likely lead to more § 1983 lawsuits by legal services organizations, and the quality of the child support services provided by the Title IV-D Program will begin a continual and inevitable downward spiral.

Amici have striven to meet the standards set forth in Title IV-D, and, as local District or Prosecuting Attorneys,

they understand all too well that the public health and welfare is more at risk every day those standards are not reached. Congress and the Secretary have determined that due to the aforementioned obstacles, perfection is impossible. Accordingly, Congress allowed for "substantial compliance" as opposed to "one hundred percent compliance." If a state agency does not meet the standards for substantial compliance, the Secretary will assist in devising a corrective action plan, and will then strictly monitor that plan through an annual audit, and, if necessary, monetary sanctions. By allowing IV-D participants to request that the courts play that role, the Ninth Circuit has effectively circumvented the goals of the IV-D program itself.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed, and the opinion of the District Court should be affirmed.

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